

Apr 09, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RYAN HARTER,

Plaintiff,

v.

UNITED STATES POSTAL
SERVICE, and NATIONAL
ASSOCIATION OF LETTER
CARRIERS, AFL-CIO,

Defendants.

NO: 2:19-CV-161-RMP

ORDER GRANTING MOTION FOR
PROTECTIVE ORDER AND
MOTION TO EXPEDITE

BEFORE THE COURT is the parties' Stipulated Motion for Protective Order, ECF No. 22, and accompanying Motion to Expedite, ECF No. 23. Upon review of the record, the Court finds good cause to grant both motions.

A district court may issue protective orders regarding discovery upon a showing of good cause. Fed. R. Civ. P. 26(c). Before issuing a stipulated protective order, a district court judge should ensure that the protective order's restrictions do not infringe on the public's general right to inspect and copy judicial

1 records and documents. *See Kamakana v. City and Cty. of Honolulu*, 447 F.3d
2 1172, 1178 (9th Cir. 2006).

3 Having reviewed the protective order and the record, the Court finds good
4 cause to grant the stipulated motion and enter the agreed-upon protective order.

5 Accordingly, **IT IS HEREBY ORDERED** that the parties' stipulated motion for
6 protective order, **ECF NO. 22**, and the accompanying Motion to Expedite, **ECF**
7 **No. 23**, are **GRANTED**. The protective order is set forth below.

8 **STIPULATED PROTECTIVE ORDER**

9 Disclosure and discovery activity in this action may involve production of
10 confidential, proprietary, or private information for which special protection from
11 public disclosure and from use for any purpose other than prosecuting this litigation
12 may be warranted. Accordingly, the parties hereby stipulate to and petition the court
13 to enter the following Stipulated Protective Order. The parties acknowledge that this
14 Order does not confer blanket protections on all disclosures or responses to
15 discovery and that the protection it affords from public disclosure and use extends
16 only to the limited information or items that are entitled to confidential treatment
17 under the applicable legal principles. The parties further acknowledge, as set forth
18 in Section 11.3, below, that this Stipulated Protective Order does not necessarily
19 entitle them to file confidential information under seal.
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21

1 **1. DEFINITIONS**

2 1.1 Challenging Party: a Party or Non-Party that challenges the designation
3 of information or items under this Order.

4 1.2 “CONFIDENTIAL” Information or Items: information (regardless of
5 how it is generated, stored or maintained) or tangible things that qualify for
6 protection under Federal Rule of Civil Procedure 26(c).

7 1.3 Counsel (without qualifier): Outside Counsel of Record and House
8 Counsel (as well as their support staff).

9 1.4 Designating Party: a Party or Non-Party that designates information or
10 items that it produces in disclosures or in responses to discovery as
11 “CONFIDENTIAL.”

12 1.5 Disclosure or Discovery Material: all items or information, regardless
13 of the medium or manner in which it is generated, stored, or maintained
14 (including, among other things, testimony, transcripts, and tangible things),
15 that are produced or generated in disclosures or responses to discovery in this
16 matter.

17 1.6 Expert: a person with specialized knowledge or experience in a matter
18 pertinent to the litigation who has been retained by a Party or its counsel to
19 serve as an expert witness or as a consultant in this action.

1.7 House Counsel: attorneys who are employees of a party to this action.

House Counsel does not include Outside Counsel of Record or any other outside counsel.

1.8 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

1.9 Outside Counsel of Record: (1) attorneys who are not employees of a party to this action but are retained to represent or advise a party to this action and have appeared in this action on behalf of that party or (2) attorneys in the law firm or law office of the attorneys described in the preceding clause #1.

1.10 Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

1.11 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

1.12 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

1.13 Protected Material: any Disclosure or Discovery Material that is designated as “CONFIDENTIAL.”

1 1.14 Receiving Party: a Party that receives Disclosure or Discovery Material
2 from a Producing Party.

3 **2. SCOPE**

4 The protections conferred by this Stipulation and Order cover not only
5 Protected Material (as defined above), but also (1) any information copied or
6 extracted from Protected Material; (2) all copies, excerpts, summaries, or
7 compilations of Protected Material; and (3) any testimony, conversations, or
8 presentations by Parties or their Counsel that might reveal Protected Material.

9 However, the protections conferred by this Stipulation and Order do not cover the
10 following information: (a) any information that is in the public domain at the time of
11 disclosure to a Receiving Party or becomes part of the public domain after its
12 disclosure to a Receiving Party as a result of publication not involving a violation of
13 this Order, including becoming part of the public record through trial or otherwise;
14 and (b) any information known to the Receiving Party prior to the disclosure or
15 obtained by the Receiving Party after the disclosure from a source who obtained the
16 information lawfully and under no obligation of confidentiality to the Designating
17 Party. Any use of Protected Material at trial shall be governed by a separate
18 agreement or order.

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1 **3. DURATION**

2 Even after final disposition of this litigation, the confidentiality obligations
3 imposed by this Order shall remain in effect until a Designating Party agrees
4 otherwise in writing or a court order otherwise directs. Final disposition shall be
5 deemed to be the later of (1) dismissal of all claims and defenses in this action, with
6 or without prejudice; and (2) final judgment herein after the completion and
7 exhaustion of all appeals, re-hearings, remands, trials, or reviews of this action,
8 including the time limits for filing any motions or applications for extension of time
9 pursuant to applicable law.

10 **4. DESIGNATING PROTECTED MATERIAL**

11 4.1 Exercise of Restraint and Care in Designating Material for Protection.

12 Each Party or Non-Party that designates information or items for protection
13 under this Order must take care to limit any such designation to specific
14 material that qualifies under the appropriate standards. *See Kamakana v. City*
15 *and Cnty. of Honolulu*, 447 F.3d 1172 (9th Cir. 2006). The Designating Party
16 must designate for protection *only those parts of material, documents, items,*
17 *or oral or written communications that qualify*, so that other portions of the
18 material, documents, items, or communications for which protection is not
19 warranted are not swept unjustifiably within the ambit of this Order.

20 Mass, indiscriminate, or routinized designations are prohibited.

21 Designations that are shown to be clearly unjustified or that have been made

1 for an improper purpose (e.g., to unnecessarily encumber or retard the case
2 development process or to impose unnecessary expenses and burdens on other
3 parties) may result in sanctions.

4 If it comes to a Designating Party's attention that information or items
5 that it designated for protection do not qualify for protection, that Designating
6 Party must promptly notify all other Parties that it is withdrawing the mistaken
7 designation.

8 4.2 Manner and Timing of Designations. Except as otherwise provided in
9 this Order (see, e.g., second paragraph of section 5.2(a) below), or as
10 otherwise stipulated or ordered, Disclosure or Discovery Material that
11 qualifies for protection under this Order must be clearly so designated before
12 the material is disclosed or produced.

13 Designation in conformity with this Order requires:

14 (a) for information in documentary form (e.g., paper or electronic
15 documents, but excluding transcripts of depositions or other pretrial or trial
16 proceedings), that the Producing Party affix the legend "CONFIDENTIAL" to
17 each page that contains protected material. If only a portion or portions of the
18 material on a page qualifies for protection, the Producing Party also must
19 clearly identify the protected portion(s) (e.g., by making appropriate markings
20 in the margins). A Party or Non-Party that makes original documents or
21 materials available for inspection need not designate them for protection until

1 after the inspecting Party has indicated which material it would like copied
2 and produced. During the inspection and before the designation, all of the
3 material made available for inspection shall be deemed “CONFIDENTIAL.”
4 After the inspecting Party has identified the documents it wants copied and
5 produced, the Producing Party must determine which documents, or portions
6 thereof, qualify for protection under this Order. Then, before producing the
7 specified documents, the Producing Party must affix the “CONFIDENTIAL”
8 legend to each page that contains Protected Material. If only a portion or
9 portions of the material on a page qualifies for protection, the Producing Party
10 also must clearly identify the protected portion(s) by making appropriate
11 markings in the margins.

12 (b) for testimony given in deposition or in other pretrial or trial
13 proceedings, the Designating Party may identify on the record, before the
14 close of the deposition, hearing, or other proceeding, all protected testimony
15 or, after receipt of the transcript, the Designating Party may designate portions
16 of the transcript as confidential by writing to the other parties indicating those
17 parts of the transcript that the Designating Party deems confidential.

18 (c) for information produced in some form other than documentary and
19 for any other tangible items, that the Producing Party affix in a prominent
20 place on the exterior of the container or containers in which the information or
21 item is stored the legend “CONFIDENTIAL.” If only a portion or portions of

1 the information or item warrant protection, the Producing Party, to the extent
2 practicable, shall identify the protected portion(s).

3 4.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
4 failure to designate qualified information or items does not, standing alone,
5 waive the Designating Party's right to secure protection under this Order for
6 such material. Upon timely correction of a designation, the Receiving Party
7 must make reasonable efforts to assure that the material is treated in
8 accordance with the provisions of this Order.

9 5. **CHALLENGING CONFIDENTIALITY DESIGNATIONS**

10 5.1 Timing of Challenges. Any Party or Non-Party may challenge a
11 designation of confidentiality at any time. Unless a prompt challenge to a
12 Designating Party's confidentiality designation is necessary to avoid
13 foreseeable, substantial unfairness, unnecessary economic burdens, or a
14 significant disruption or delay of the litigation, a Party does not waive its right
15 to challenge a confidentiality designation by electing not to mount a challenge
16 promptly after the original designation is disclosed.

17 5.2 Meet and Confer. The Challenging Party shall initiate the dispute
18 resolution process by providing written notice of each designation it is
19 challenging and describing the basis for each challenge. To avoid ambiguity
20 as to whether a challenge has been made, the written notice must recite that
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1 the challenge to confidentiality is being made in accordance with the
2 Protective Order challenge provisions. The parties shall attempt to resolve
3 each challenge in good faith and must begin the process by conferring directly
4 within fourteen (14) days of the date of service of notice. In conferring, the
5 Challenging Party must explain the basis for its belief that the confidentiality
6 designation was not proper and must give the Designating Party an
7 opportunity to review the designated material, to reconsider the
8 circumstances, and, if no change in designation is offered, to explain the basis
9 for the chosen designation. A Challenging Party may proceed to the next
10 stage of the challenge process only if it has engaged in this meet and confer
11 process first or establishes that the Designating Party is unwilling to
12 participate in the meet and confer process in a timely manner.

13 5.3 Judicial Intervention. If the Parties cannot resolve a challenge without
14 court intervention, the Designating Party shall file and serve a motion to retain
15 confidentiality within 21 days of the initial notice of challenge or within 14
16 days of the parties agreeing that the meet and confer process will not resolve
17 their dispute, whichever is earlier. Each such motion must be accompanied
18 by a competent declaration affirming that the movant has complied with the
19 meet and confer requirements imposed in the preceding paragraph. Failure by
20 the Designating Party to make such a motion including the required
21 declaration within 21 days (or 14 days, if applicable) shall automatically

1 waive the confidentiality designation for each challenged designation. In
2 addition, the Challenging Party may file a motion challenging a
3 confidentiality designation at any time if there is good cause for doing so,
4 including a challenge to the designation of a deposition transcript or any
5 portions thereof. Any motion brought pursuant to this provision must be
6 accompanied by a competent declaration affirming that the movant has
7 complied with the meet and confer requirements imposed by the preceding
8 paragraph.

9 The burden of persuasion in any such challenge proceeding shall be on
10 the Designating Party. Frivolous challenges, and those made for an improper
11 purpose (e.g., to harass or impose unnecessary expenses and burdens on other
12 parties) may expose the Challenging Party to sanctions. Unless the
13 Designating Party has waived the confidentiality designation by failing to file
14 a motion to retain confidentiality as described above, all parties shall continue
15 to afford the material in question the level of protection to which it is entitled
16 under the Producing Party's designation until the court rules on the challenge.

17 **6. ACCESS TO AND USE OF PROTECTED MATERIAL**

18 **6.1 Basic Principles.** A Receiving Party may use Protected Material that is
19 disclosed or produced by another Party or by a Non-Party in connection with
20 this case only for prosecuting, defending, or attempting to settle this litigation.

21 Such Protected Material may be disclosed only to the categories of persons

1 and under the conditions described in this Order. When the litigation has been
2 terminated, a Receiving Party must comply with the provisions of section 13
3 below (FINAL DISPOSITION). Protected Material must be stored and
4 maintained by a Receiving Party at a location and in a secure manner that
5 ensures that access is limited to the persons authorized under this Order.

6 6.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
7 otherwise ordered by the court or permitted in writing by the Designating
8 Party, a Receiving Party may disclose any information or item designated
9 “CONFIDENTIAL” only to:

10 (a) the Receiving Party’s Counsel of Record in this action, as well as
11 employees of said Counsel of Record to whom it is reasonably necessary to
12 disclose the information for this litigation;

13 (b) the officers, directors, and employees (including House Counsel) of
14 the Receiving Party to whom disclosure is reasonably necessary for this
15 litigation and who have signed the “Acknowledgment and Agreement to Be
16 Bound” (Exhibit A);

17 (c) Experts (as defined in this Order) of the Receiving Party to whom
18 disclosure is reasonably necessary for this litigation and who have signed the
19 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

20 (d) the court and its personnel;
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1 (e) court reporters and their staff, professional jury or trial consultants,
2 mock jurors, and Professional Vendors to whom disclosure is reasonably
3 necessary for this litigation and who have signed the “Acknowledgment and
4 Agreement to Be Bound” (Exhibit A);

5 (f) during their depositions, witnesses in the action to whom disclosure
6 is reasonably necessary and who have signed the “Acknowledgment and
7 Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the
8 Designating Party or ordered by the court. Pages of transcribed deposition
9 testimony or exhibits to depositions that reveal Protected Material must be
10 separately bound by the court reporter and may not be disclosed to anyone
11 except as permitted under this Stipulated Protective Order.

12 (g) the author or recipient of a document containing the information or
13 a custodian or other person who otherwise possessed or knew the information.

14 **7. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
15 **PRODUCED IN OTHER LITIGATION**

16 If a Party is served with a subpoena or a court order issued in other litigation
17 that compels disclosure of any information or items designated in this action as
18 “CONFIDENTIAL,” that Party must:

19 (a) promptly notify in writing the Designating Party. Such notification
20 shall include a copy of the subpoena or court order;

1 (b) promptly notify in writing the party who caused the subpoena or
2 order to issue in the other litigation that some or all of the material covered by
3 the subpoena or order is subject to this Protective Order. Such notification
4 shall include a copy of this Stipulated Protective Order; and

5 (c) cooperate with respect to all reasonable procedures sought to be
6 pursued by the Designating Party whose Protected Material may be affected.

7 If the Designating Party timely seeks a protective order, the Party
8 served with the subpoena or court order shall not produce any information
9 designated in this action as “CONFIDENTIAL” before a determination by the
10 court from which the subpoena or order issued, unless the Party has obtained
11 the Designating Party’s permission. The Designating Party shall bear the
12 burden and expense of seeking protection in that court of its confidential
13 material, and nothing in these provisions should be construed as authorizing or
14 encouraging a Receiving Party in this action to disobey a lawful directive
15 from another court.

16 8. **A NON-PARTY’S PROTECTED MATERIAL SOUGHT**
17 **TO BE PRODUCED IN THIS LITIGATION**

18 (a) The terms of this Order are applicable to information produced by a
19 Non-Party in this action and designated as “CONFIDENTIAL.” Such
20 information produced by Non-Parties in connection with this litigation is
21 protected by the remedies and relief provided by this Order. Nothing in these

1 provisions should be construed as prohibiting a Non-Party from seeking
2 additional protections.

3 (b) In the event that a Party is required, by a valid discovery request, to
4 produce a Non-Party's confidential information in its possession, and the
5 Party is subject to an agreement with the Non-Party not to produce the Non-
6 Party's confidential information, then the Party shall:

7 (1) promptly notify in writing the Requesting Party and the Non-Party
8 that some or all of the information requested is subject to a
9 confidentiality agreement with a Non-Party;

10 (2) promptly provide the Non-Party with a copy of the Stipulated
11 Protective Order in this litigation, the relevant discovery request(s), and
12 a reasonably specific description of the information requested; and

13 (3) make the information requested available for inspection by the
14 Non-Party.

15 (c) If the Non-Party fails to object or seek a protective order from this
16 court within fourteen (14) days of receiving the notice and accompanying
17 information, the Receiving Party may produce the Non-Party's confidential
18 information responsive to the discovery request. If the Non-Party timely
19 seeks a protective order, the Receiving Party shall not produce any
20 information in its possession or control that is subject to the confidentiality
21 agreement with the Non-Party before a determination by the court. Absent a

1 court order to the contrary, the Non-Party shall bear the burden and expense
2 of seeking protection in this court of its Protected Material.

3 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

4 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
5 Protected Material to any person or in any circumstance not authorized under this
6 Stipulated Protective Order, the Receiving Party must immediately (a) notify in
7 writing the Designating Party of the unauthorized disclosures, (b) use its best efforts
8 to retrieve all unauthorized copies of the Protected Material, (c) inform the person or
9 persons to whom unauthorized disclosures were made of all the terms of this Order,
10 and (d) request such person or persons to execute the “Acknowledgment and
11 Agreement to Be Bound” that is attached hereto as Exhibit A.

12 **10. INADVERTENT PRODUCTION OF PRIVILEGED**
13 **OR OTHERWISE PROTECTED MATERIAL**

14 When a Producing Party gives notice to Receiving Parties that certain
15 inadvertently produced material is subject to a claim of privilege or other protection,
16 the obligations of the Receiving Parties are those set forth in the Federal Rules of
17 Civil Procedure. This provision is not intended to modify whatever procedure may
18 be established in an e-discovery order that provides for production without prior
19 privilege review.

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11. **MISCELLANEOUS**

11.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the court in the future.

11.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

11.3 Filing Protected Material. If a Party obtains written permission from the Designating Party, the Party may file Protected Material in the public record in this action. If a Party does not obtain the permission of the Designating Party to file Protected Material in the public record, then the Party may move to file the Protected Material under seal, and the Court will decide whether the Protected Material should be filed under seal, or in the public record. *See Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172 (9th Cir. 2006). A Party that seeks to file under seal any Protected Material must comply with any applicable court rule regarding filings under seal.

12. **FINAL DISPOSITION**

Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Party or

1 destroy such material. As used in this subdivision, “all Protected Material” includes
2 all copies, abstracts, compilations, summaries, and any other format reproducing or
3 capturing any of the Protected Material. Whether the Protected Material is returned
4 or destroyed, the Receiving Party must submit a written certification to the Producing
5 Party (and, if not the same person or entity, to the Designating Party) by the 60 day
6 deadline that (1) identifies (by category, where appropriate) all the Protected Material
7 that was returned or destroyed and (2) affirms that the Receiving Party has not
8 retained any copies, abstracts, compilations, summaries or any other format
9 reproducing or capturing any of the Protected Material. Notwithstanding this
10 provision, Counsel are entitled to retain an archival copy of all pleadings, motion
11 papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence,
12 deposition and trial exhibits, expert reports, attorney work product, and consultant
13 and expert work product, even if such materials contain Protected Material. Any
14 such archival copies that contain or constitute Protected Material remain subject to
15 this Protective Order as set forth in Section 3 (DURATION).

16 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order
17 and provide copies to counsel.

18 **DATED** April 9, 2020.

19 s/ Rosanna Malouf Peterson
20 ROSANNA MALOUF PETERSON
21 United States District Judge